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In The Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION AND INTERNET ARCHIVE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO THE WRIT OF *CERTIORARI*

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* is submitted by the Computer and Communications Industry Association and the Internet Archive ("*Amici*") pursuant to Rule 37 of the Rules of this Court. *Amici* urge that the Court deny the requested writ of certiorari.

The Computer and Communications Industry Association represents telecommunications and networking equipment manufacturers, software developers, Internet-, telecommunications- and financial-service providers, re-sellers, integrators and others vitally interested in the unhindered flow of information. Member companies employ almost one million workers and generate over $300 billion in annual revenue.

The Internet Archive is a public nonprofit "Internet library," created to offer public access to historical collections over the Internet. Peer-to-peer file technologies are valuable tools for the Internet Archive, allowing efficient and economical distribution to the public of its collections, including growing quantities of large audio and video files. The Internet Archive's ability to achieve its mission will be drastically affected by any decision that constricts innovation in peer-to-peer technologies.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief. Students of the Boalt Hall School of Law, University of California, Berkeley, Samuelson Law, Technology & Public Policy Clinic (Lila Bailey and Sherwin Siy), and the American University, Washington College of Law, Glushko-Samuelson Intellectual Property Law Clinic (Scott Albright, Benjamin Allen, Saad Aslam, Scott Brairton, Thomas Burns, Regan Fitzgerald, Dalia Georgi, Traci Hale, Nabila Isa-Odidi, Amy Jiron, Laurel Johnson, Nayoung Kim, Isadora Lee, Janet Lee, Tuan Nguyen, Ramya Prakasam, Lara Simon, Fernando Soltanik, Chris Sorey, and Elaine Tran) helped to prepare this brief under the supervision of Laura Quilter, Joshua Sarnoff, and Peter Jaszi.

SUMMARY OF ARGUMENT

This Court should reject Petitioners' invitation to reexamine the balanced approach to accommodating copyright law and technological innovation adopted in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Experience demonstrates that the clear, predictable *Sony* precedent provides vital space for innovation. Over the past two decades, socially useful technologies have flourished and new markets have developed. To revisit the issue at this time would be to wager on technological futures. Under *Sony*'s clear legal standard, copyright owners and technology providers normally have made and will continue to make their own accommodations without the intervention of courts or legislatures. Even where regulation may be required, it is best undertaken through narrowly-tailored legislative or administrative action, rather than judicial rulings of general applicability.

ARGUMENT

I. This Court's Decision in *Sony* Reinforced a Time-Honored Approach to Accommodating Copyright Interests Without Regulating Technological Change.

The petition frames the issue as a dispute over the proper interpretation of *Sony*, arguing that while the Court of Appeals for the Ninth Circuit interpreted it incorrectly in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), the Court of Appeals for the Seventh Circuit did so correctly in *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (Posner, J.). In fact, however, the Petitioners seek nothing less than a reversal of this foundational copyright decision. The approach Petitioners draw from Judge Posner's *dicta* would substitute a complicated, indeterminate economic balancing test for the simple and direct *Sony* standard – that the provider of a technology

should not be held secondarily liable for infringing uses if the technology is "capable of substantial noninfringing uses."[2] This Court should not reach out to undo a precedent that has given so much good service, and is so deeply rooted in copyright tradition.

Over three centuries, copyright law has taken in stride a series of temporarily disruptive changes in information technology. The law's resilience stems from a choice made early on: that copyright would regulate the ways people use technology but not technology itself. In the seventeenth century, the British Crown had enforced rules about who could and could not practice the art of printing; in effect, it regulated the market in printed books by limiting access to the core technology. But the 1710 Statute of Anne took a different approach. Under its provisions, anyone could set up as a publisher, and only those who infringed copyright would face legal action. In this new legal environment, modern practices of copyright licensing gradually arose to accommodate the tension between rights holders and would-be distributors.[3]

At various moments in U.S. copyright history, courts have turned away from the temptation to intervene in the process through which new technologies are developed and adopted – with uniformly happy results. Thus, everyone concerned eventually would look back with satisfaction on the recording industry having survived early attacks by sheet music publishers.[4] More recently, the movie industry's failure to block personal video recording technology opened profitable new markets for motion pictures.[5] Moreover, this latter episode gave us the *Sony*

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[2] *Sony*, 464 U.S. at 442.

[3] *See generally* John Feather, *Publishing, Piracy and Politics* 37-96 (1994).

[4] *See White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

[5] *See* James Lardner, *Fast Forward* 312-28 (1987).

standard, which has assured even greater social and cultural benefits. Without this clear-cut test, the threat of secondary liability might have prevented many valuable technologies from becoming available. Under *Sony,* they have flourished.

II. Since 1984, Important New Information and Communications Technologies Have Grown Up in the Space for Innovation Provided by the *Sony* Standard.

The post-*Sony* period has witnessed a proliferation of new technologies offering creators and information consumers an unprecedented range of choices for recording and communicating information. Among them are new consumer electronics products, such as computers designed to incorporate digital entertainment[6] and new video tools that put enormous creative power into the hands of individuals.[7] These technologies can be used for infringement or even commercial piracy, but they have many positive uses as well.[8] There are many more examples, among them the following.

[6] *See, e.g.*, Edward C. Baig, *Microsoft Showcases Windows XP Media Center,* Wirelessnewsfactor.com, Oct. 15, 2004, *at* http://wireless.newsfactor.com/story.xhtml?story_id=27655; Microsoft Corp., *Microsoft Windows XP Media Center Edition 2005, at* http://www.microsoft.com/windowsxp/mediacenter/evaluation/default.mspx (last visited Nov. 5, 2004).

[7] For a description of features of new-generation camcorders, see Jim Fuquay, *Cutting the Wire: New Home Technology Won't Leave Consumers Tangled Up,* Fort-Worth Star-Telegram, Jan. 11, 2004, at F1.

[8] Significantly, copyright owners' response to these technologies has been to seek special penalties for certain *uses* of them – for purposes such as videotaping commercial motion pictures in theaters. As of September 22, 2004, six states had adopted laws prohibiting this practice and thirteen others are considering similar legislation. *See* National Conference of State Legislatures, *Camcorders or Recording Devices in Movie Theatres, at* http://www.ncsl.org/programs/lis/CIP/

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A. Internet-based communications and related technologies

Electronic mail technology is a ubiquitous feature of modern daily life.[9] The ability of e-mail to facilitate communication was transformed in 1993, with the introduction of attachments (including text, images and sound) under the MIME ("Multipurpose Internet Mail Extension") protocol.[10] Adobe's PDF ("Portable Document Format") took hold as a data interchange format because it provides multi-platform compatibility preserving the contents and appearance of documents.[11] PDF, with more than 500,000,000 copies distributed, is made more powerful by the ease with which paper documents can be processed into it using a personal computer and a conventional desktop scanner.[12] "Broadband" connectivity,[13]

tape-in-theaters0304.htm (last visited Nov. 5, 2004). Similar provisions are present in H.R. 4077, 108th Cong. (2004), the Piracy Deterrence and Education Act that passed the House of Representatives on Sept. 28, 2004 and is pending in the Senate.

[9] *See, e.g.*, Daniel J. Blum & David M. Litwack, *The E-Mail Frontier* 2 (1995).

[10] *See* University of Illinois, Chicago, Academic Computing Center, *A Brief Email History (or why MIME does what it does),* The ADN Connection (Sept.-Oct. 1996), *at* http://www.uic.edu/depts/accc/newsletter/adn13/history.html (last visited Nov. 6, 2004).

[11] *See* Adobe Systems Inc., *What is Adobe PDF?, at* http://www.adobe.com/products/acrobat/adobepdf.html (last visited Oct. 24, 2004).

[12] *See, e.g.*, ExtremeTech, *How Scanners Work*, at http://www.extremetech.com/article2/0,1558,1157540,00.asp (last visited Oct. 24, 2004). Governments, lawyers, businesses, financial institutions, engineering professionals, printers, and others use PDF for their external and internal communications. *See, e.g.*, Duff Johnson, *The Many Varied Uses of PDF*, Planet PDF (Apr. 1, 2004), at http://www.planetpdf.com/enterprise/article.asp?ContentID=6438.

[13] Center for Democracy and Technology, *Broadband Backgrounder: Public Policy Issues Raised by Broadband Technology, at* http://www.cdt.org/digi_infra/broadband/backgrounder.shtml#ES (Dec. 2000). These technologies include Digital Subscriber Line (DSL), Cable Modem, Wireless Internet, and Satellite. See Consumer &

(Continued on following page)

in turn, allows high-speed transmission of e-mail (including large PDF attachments). These communications technologies are so prevalent that the U.S. District Court for the District of Columbia uses them for public dissemination of information and for mandatory electronic document filing.[14]

Obviously, communications technologies can be used for copyright infringement, such as the unauthorized reproduction and transmission of copyrighted material to the members of a mailing list or listserve. Thus, the Association of American Publishers has noted that technology has the "potential to devastate the creative works that are the subject of scanning."[15] Likewise, representatives of copyright industries have expressed concern about the spread of broadband technologies. As Jack Valenti, former head of the Motion Picture Association of America, put it in 2002:

> Only some 9.5 million American computer homes have current high-speed, large pipe connections to the Internet. But that moat will gradually be drained as broadband grows. . . . Once that happens . . . the avalanche will have begun. It is

Governmental Affairs Bureau, Federal Communications Commission, *Broadband: High Speed Internet Access*, *at* http://www.fcc.gov/cgb/broadband.html (last visited Oct. 26, 2004).

[14] *See* United States District Court for the District of Columbia, LCvR 5.4(a), *available at* http://www.dcd.uscourts.gov/LocalRulesEditedMarch2004.pdf; United States District Court for the District of Columbia, *ECF Filing Pointers*, at 1, *at* http://www.dcd.uscourts.gov/ECF-Filing-Pointers.pdf (last visited Nov. 5, 2004) (requiring filing in pdf format).

[15] Assoc. of Am. Publishers, *An AAP Position Paper on Scanning*, *at* http://www.publishers.org/conference/pubinfo.cfm?PublicationID=2 (last visited Nov. 5, 2004).

> the certainty of that scenario which concerns every movie maker and distributor in the land.[16]

But in the post-*Sony* environment, and because of the clear *Sony* standard, copyright owners have rightly focused their attention on individuals and organizations making questionable use of e-mail, PDF, scanners and broadband technologies – and have avoided challenging these tools as such.

B. High-density recordable media

Today, nearly every computer sold is equipped with drives capable of "writing" or "burning" large amounts of data to portable storage media such as CD-ROMs or DVD-ROMs. The lawful uses of this technology range from the preparation of massive data sets for submission to government agencies[17] to the archiving of personal photographs.[18] Likewise, high-capacity portable media players (for example, the Apple iPod) are gaining in popularity. Compressed digital music files may be transmitted between sources on the Internet, personal computers and these new devices, which also can be used as portable hard drives for storing digital files of all kinds.[19] Thanks to the wide adoption of these devices by

[16] Jack Valenti Press Releases, *A Clear Present and Future Danger: The potential undoing of America's greatest export trade prize* (Feb. 12, 2002), *available at* http://www.mpaa.org/jack/2002/2002_02_12b.htm.

[17] *See, e.g.*, 37 C.F.R. §§ 1.52(e), 1.821(c) (2004) (Patent Office rules permitting nucleotide sequence listings to be submitted on CD-ROM).

[18] *See, e.g.*, Photo-Album-DVD.com, *Play High Resolution Photo Album on TV with DVD player*, *at* http://www.photo-album-dvd.com (last visited Nov. 5, 2004); Hewlett-Packard Dev. Co., *Build a Photo Archive with CDs*, *at* http://h50016.www5.hp.com/ul_buildphotoarchive.asp (last visited Nov. 5, 2004).

[19] *See* Apple Computer, Inc., *iPod*, *at http://www.apple.com/ipod* (last visited Nov. 5, 2004).

consumers,[20] a new market for copyrighted music has arisen in the form of licensed downloads from several web-based "music stores."[21]

Although at its inception CD recorder technology was opposed by many in the software and music industries concerned about risks of copyright infringement, the *Sony* standard has required these groups to refocus their efforts on misuse of the technology.[22] Likewise, portable media players remain available to consumers because they are "'capable of substantial non-infringing uses.'"[23] As a result, the music industry has had no choice but to respond constructively – seeking to exploit rather than to suppress the technology.

[20] By the end of 2003, Apple alone sold more than 1.5 million iPods. *See* Michael A. Einhorn, *Music in the Crucible: A Year in Review*, 22 Ent. & Sports Law 1, 24 (2004). Apple sold two million players in the third quarter of 2004 alone. *See* David Pogue, *The iPod's New Trick: Photo Show*, N.Y. Times, Oct. 28, 2004, *at* G1.

[21] *See, e.g.*, Apple Computer, Inc., *iTunes*, *at* http://www.apple.com/itunes (last visited Nov. 5, 2004). Apple's iTunes is an "inexpensive, legal alternative" for complying with copyright laws and without impeding the innovation of technology. Christopher Jenson, *The More Things Change, The More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 Stan. L. Rev. 531, 568 (2003). The Apple iTunes store has sold 150 million songs since its inception in April of 2003. *See* John Borland, *Apple iTunes Sales Quicken*, Oct. 14, 2004, *at* http://news.com/2110-1027_3-5410365.html.

[22] Although some uses of CD "burners" to copy prerecorded music are immunized from liability under the Audio Home Recording Act of 1992 (*codified at* 17 U.S.C. §§ 1001-10), *see* Part IV *infra*, the use of the technology to reproduce copyrighted texts, images, software programs, etc., falls outside the coverage of that act. Rather, it is the *Sony* standard that allows them to be freely offered.

[23] *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (citing *Sony*, 464 U.S. at 455). *See also* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 139 (2003).

III. P2P Technologies Developed Under the *Sony* Standard Are Socially Useful and Open New Markets for Valuable Services.

A. P2P Technologies Provide Security of Information Access and Assure Network Stability.

Even peer-to-peer networks ("P2P"), the technological architecture of greatest concern to Petitioners, have numerous benefits. Security of access to critical information can best be assured through a distributed and redundant information network. These principles underlie the military's design of the forebear of the Internet, ARPAnet (the Advanced Research Projects Agency Network), which was designed to withstand a nuclear attack.[24] Today, these principles are embodied in P2P networks, which ensure the accessibility and stability of vital information. For example, many libraries use P2P to provide assured access to electronic journals, with a program called LOCKSS (for "Lots of Copies Keep Stuff Safe").[25] Instead of storing electronic journals only on publishers' servers, leaving access vulnerable to technical problems, LOCKSS libraries store copies on their own computers and share them with other subscriber libraries[26] – eliminating the problem of damaged or lost copies.

[24] *See, e.g.*, Smithsonian Institution, *Birth of the Internet: Arpanet*, *at* http://smithsonian.yahoo.com/arpanet2.html (last visited Nov. 5, 2004); Stanley Manoski, *Eliminating the Middleman: Peer-to-Peer Technology for Command and Control*, 6 The Edge 8 (Summer 2002), *at* http://www.mitre.org/news/the_edge/summer_02/summer_02.pdf.

[25] *See* LOCKSS, *Project Descriptions*, *at* http://lockss.stanford.edu/projectdescbrief.htm (last visited Nov. 5, 2004) ("LOCKSS"). *See also Storing e-text for centuries*, The Economist, Jun. 19, 2003, *available at* http://www.economist.com/science/tq/displayStory.cfm?story_id=1841010. Users include the Library of Congress, Los Alamos National Laboratory, and countless universities.

[26] *See* LOCKSS, *supra*.

Further, P2P networks provide a stable and more resilient platform that ensures content availability. Information on centralized servers is vulnerable to sabotage (*e.g.*, by a "denial of service" attack),[27] equipment failure or server access problems due to unanticipated popularity ("slashdotting").[28] For example, after the attacks of September 11, 2001, news websites were overwhelmed[29] and telephone systems were clogged.[30] In contrast, communications flowed freely across P2P instant messaging ("IM") networks.[31]

P2P networks also can reduce server and bandwidth problems caused by traffic in a few large files or a large number of small files. For example, National Aeronautics and Space Administration (NASA) mission images and datasets, extremely large files, are in high demand. By seeding P2P networks with the files, the scientific community optimizes access to critical data, decentralizing

[27] *See* SearchSecurity.com, *Denial of Service*, *at* http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci213591,00.html (last visited Nov. 5, 2004).

[28] When the popular Internet news website, Slashdot.org, lists a site, the site often receives so many hits that its server is overwhelmed. *See, e.g., Open Source Technology Group*, What is the "Slashdot Effect"?, http://slashdot.org/faq/slashmeta.shtml (last visited Nov. 5, 2004).

[29] *See, e.g.*, Owen Gibson, *News Websites' Traffic Soars*, The Guardian, Sept. 12, 2001, *available at* http://www.guardian.co.uk/wtccrash/story/0,1300,550781,00.html; CNN.com, *Internet Proves Vital Communications Tool*, Sept. 12, 2001, *at* http://archives.cnn.com/2001/TECH/internet/09/12/attacks.internet; *War Surge for Internet Traffic*, National Business Review, March 21, 2003, *available at* http://www.nbr.co.nz/home/column_article.asp?id=5485&cid=3&cname=Technology.

[30] Curtis Lee Fulton, *P2P Is on the Military's Radar*, The Online Reporter, Nov. 12, 2001 (available on LexisNexis, Nov. 6, 2004).

[31] *See* Fulton, *supra*. An IM-related service was the subject of the *Aimster* suit. *See* 334 F.3d at 646.

and replicating it across the network.[32] P2P networks help to create an indestructible Library of Alexandria, where all information is available all the time. Similarly, P2P promotes burden sharing, allowing archives and libraries to share the bandwidth and resources necessary to maintain and provide public access to information. Thus, the Internet Archive uses P2P networks to distribute its public domain content, which simultaneously speeds access and reduces strain on its servers.[33] The BBC is also opening its archives to distribution over P2P networks – a collection of 600,000 hours of television and 500,000 audio recordings.[34]

B. P2P Technologies Provide Access to a Vast and Growing Body of Noninfringing Content, Government Information and Political Speech.

Thousands of public domain files are available to millions of users on P2P networks, including books, films and other cultural artifacts.[35] Recent searches[36] found

[32] *See NASA/Jet Propulsion Lab., Calif. Inst. of Tech., Welcome to Maestro Headquarters, at* http://mars.telascience.org/home (last visited Nov. 5, 2004).

[33] *See* Internet Archive, *What are the P2P Options links?, at* http://www.archive.org/about/faq.php?faq_id=192 (last visited Nov. 5, 2004).

[34] *See* Lucy Sherriff, *BBC ponders P2P distribution*, The Register, Feb. 17, 2004, *at* http://www.theregister.co.uk/2004/02/17/bbc_ponders_p2p_distribution; Fraser Lovatt, *BBC Creative Archive: Pilot to start in 2005*, *Digital-Lifestyles.info*, Oct. 29, 2004, *at* http://digital-lifestyles.info/display_page.asp?section=cm&id=1723.

[35] *Grokster*, 380 F.3d at 1161-62.

[36] All specific materials discussed in this section were found through searches conducted Oct. 24 – Nov. 5, 2004, on the Gnutella and FastTrack networks using P2P clients LimeWire (*available at* http://limewire.org), Shareaza (*available at* http://www.shareaza.com), Kazaa (*available at* http://kazaa.com), Poisoned (*available at* http://gottsilla.net), and Grokster (*available at* http://www.grokster.com).

works ranging from the classics of Homer and Shakespeare, through the central religious texts of Christianity, Judaism and Islam, to enduring works of literature by Tolstoy, Melville and Whitman. Classic scientific writings also are available, including Charles Darwin's *On the Origin of Species* (1909-14) and Albert Einstein's *Relativity* (1920). While the works found are too numerous to list, Project Gutenberg alone has made over 13,000 titles available electronically, most of which are older works in the public domain.[37] Thousands of public domain films are readily available on P2P networks,[38] such as Alfred Hitchcock's *The Thirty-Nine Steps* (1935). D.W. Griffith's sweeping drama about the American South, *The Birth of a Nation* (1915), is available via P2P for study of its impact on 20th century race relations. The Prelinger Archive's industrial and promotional films are widely available on P2P networks.[39] Significant political works such as *The Federalist Papers* (1787-88), Adam Smith's *The Wealth of Nations* (1776), and Henry David Thoreau's *Walden* (1854), also are available on P2P networks. Recordings of both Martin Luther King's "I Have a Dream" (1963) speech and President Franklin Delano Roosevelt's address to the nation after the Pearl Harbor attacks (1941) are available via P2P.

Countless important U.S. government works, such as Census records, legislative history, agency rules and notices, public service films and scientific reports, are available on P2P networks. The famous U.S. Federal Civil Defense Administration's film *Duck and Cover* (1951), in which a cartoon turtle instructs children what to do in the event of an atomic attack, illustrates our political history

[37] Project Gutenberg, *Welcome to Project Gutenberg, at* http://www.gutenberg.org (last visited Nov. 5, 2004).

[38] *See* Desert Island Films, *Desert Island Films Catalogue, at* http://www.desertislandfilms.com/titles.html (last visited Oct. 31, 2004).

[39] *See* Prelinger Archive, *Welcome to the Prelinger Archives, at* http://archive.org/details/prelinger (last visited Nov. 5, 2004).

and can easily be accessed by teachers and students alike via P2P. The recordings of oral arguments before this Court have been released in MP3 format, and are available on P2P networks.[40]

Many individuals use P2P networks to rapidly and inexpensively disseminate their own political speech and cultural commentary.[41] Recent advances in media technology have enabled a renaissance in political media and commentary. One new project aims to record select Congressional webcasts and make them broadly available at no cost to the government.[42] While few citizens can afford to purchase airtime on a television network or ad space in a national newspaper, anyone with an Internet connection is now able to place government material, or his or her homegrown political ad, satire, or commentary, in the public eye at very little cost. P2P technologies thus promote the free flow of speech on the Internet, helping to make real the free speech promise of the First Amendment.

C. Growing Numbers of Artists, Authors and Others Use P2P Technologies to Distribute Copyrighted and Unprotected Content.

A growing number of artists have turned to P2P networks to freely distribute their works. For example, many musicians encourage fans to record live performances and trade them over P2P networks. The

[40] *See* Chris Karr, *The Oyez Project Releases Inaugural Set of Supreme Court MP3 Files,* June 28, 2003, *at* http://www.oyez.org/oyez/resource/nitf/273.

[41] For example, p2p-Politics.org indexes political commentary video. *See* p2p-Politics.org, About p2p-politics: FAQ, http://www.p2p-politics.org/about (last visited Nov. 5, 2004).

[42] *See* P2P Congress, *P2P Site Enables Access to Video of Government Hearings, at* http://www.p2pcongress.org/press.php (last visited Nov. 5, 2004).

Internet Archive, in conjunction with etree.org, indexes and provides P2P access to the works of over 700 "trade-friendly" bands in all popular music genres, including famous performers such as Hank Williams III, Béla Fleck and the Grateful Dead.[43] Artists also have used P2P networks to distribute studio recordings, hoping to expand audiences and boost record sales cost-effectively. When award-winning artist Steve Winwood released one track over P2P networks, sales of the album increased up to eight times in some regions, to the delight of his independent record label.[44] Well-established film artists also are exploring the benefits of exposure via P2P networks.[45]

Independent artists have profited from open distribution, developing audiences in the face of competition and a tightly-controlled market. G-Man, a hitherto unknown musician, received glowing reviews, club exposure, a record deal and awards, after authorizing open distribution of his recordings.[46] First-time novelist Cory Doctorow increased sales of *Down and Out in the Magic Kingdom* (2003) after publishing it online,[47]

[43] *See* Internet Archive, *List of Trade-Friendly Bands, at* http://www.archive.org/audio/etree-band-showall.php (last visited Nov. 5, 2004).

[44] *See* Katie Dean, *Winwood: Roll With P2P, Baby,* Wired Magazine, July 9, 2004, *available at* http://www.wired.com/news/digiwood/0,1412,64128,00.html.

[45] *See* Iain S. Bruce, *Moore: Pirate my film, no problem,* Sunday Herald, July 4, 2004, at 9, *available at* http://www.sundayherald.com/43167.

[46] *See* Janis Amy, *Using Peer To Peer To Launch A Career, at* http://www.lamn.com/modules.php?op=modload&name=News&file=article&sid=21 (last visited Nov. 5, 2004).

[47] *See* Cory Doctorow, *Ebooks: Neither E, Nor Books*, Feb. 12, 2004, *at* http://conferences.oreillynet.com/presentations/et2004/doctorow.txt.

eventually winning a reader's award[48] and electing to publish his next two books online as well as in print.[49]

The vast reach of P2P networks has enabled artists to forge new ties with promoters, transforming sponsorship models. Kevin Martin and the Hi-Watts collaborated with Yoo-Hoo, a soft drink company, to sponsor their concert tour and a five-song recording released on P2P networks.[50] By including an advertisement for Yoo-Hoo with the music files, the promotion provided Yoo-Hoo with access to millions of potential consumers, while developing the Hi-Watts fan base. Artists may also choose to circulate their music via Weed, a new P2P system that compensates users for sharing music and exposing others to it.[51] Weed's proprietary file format, which allows only three plays per track, encourages sales, and artists are directly compensated for every sale.

Further, creators are authorizing distribution of their copyrighted works with Creative Commons licenses, which are designed to encourage open distribution.[52] For example, Stanford Law Professor Lawrence Lessig released his third book, *Free Culture*, under a Creative

[48] *See* Cory Doctorow, *Down and Out wins Locus Award,* June 29, 2004, *at* http://www.craphound.com/down/archives/2004_06.php#000128.

[49] *See* Cory Doctorow, *What's this site?*, Jan. 19, 2004, *at* http://craphound.com/est/000041.html; Cory Doctorow, *Welcome to the site!*, Sept. 7, 2003, *at* http://craphound.com/place/000009.php

[50] *See* Sue Zeidler, *Entertainment Firms Quietly Using Piracy Networks,* Nov. 3, 2003, *at* http://www.kmband.com/kmbandmedia_press_reuters_110303.php; Jon Healey, *Band, Drinks Firm Hope Profits Will Flow From Free Songs; The maker of Yoo-Hoo backs Kevin Martin and the HiWatt's effort to offer free songs on the Net,* L.A. Times, Oct. 10, 2003, at C1.

[51] Weed, *Weed Pays you to Share Music Files, at* http://weedshare.com (last visited Nov. 7, 2004).

[52] *See, e.g.*, Creative Commons, *About, at* http://creativecommons.org/about/licenses (last visited Nov. 5, 2004).

Commons license.[53] Wired Magazine recently released a licensed CD including popular musicians such as David Byrne and the Beastie Boys.[54] Artists and writers who choose Creative Commons licensing are contributing to a growing pool of entirely new content, available for lawful distribution on P2P networks.

IV. The *Sony* Decision Allows Controversies Concerning New Information Technologies to Be Resolved Successfully Without Technology Regulation.

As we have noted, P2P appears to be evolving: More and more noninfringing content is being exchanged, and there are prospects for legitimizing the sharing of copyrighted material.[55] This path of development is a familiar one. One of the technologies for which the *Sony* decision had obvious and immediate relevance was photocopying, which had been a matter of concern to rights holders.[56] After *Sony,* as it became clear that the

[53] *See* Lawrence Lessig, *Free Culture/Free Content, at* http://www.free-culture.cc/freecontent (last visited Nov. 4, 2004).

[54] *See, e.g.,* Thomas Goetz, *Sample the Future,* Wired Magazine, Nov. 2004, *available at* http://www.wired.com/wired/archive/12.11/sample.html.

[55] One such solution is described in William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* 199-258 (2004) (outlining an "alternative compensation system" under which P2P uses would be subject to blanket licenses with compensation returning to record companies and artists). A more concrete instance is reported in Jon Healy, *Sony BMG, Grokster Join Forces; In an unusual alliance, the record giant will offer free and paid music via the file-sharing network,* L.A. Times, Oct. 29, 2004, at C1 (describing Mashboxx technology designed to encourage file sharers to pay for the music they intend to keep rather than merely sample).

[56] Edwin McDowell, *Ideas and Trends: College of "Copy Mills" Grinds Quickly so Publishers Sue,* N.Y. Times, Dec. 19, 1982, § 4, at 18. While Congress had considered photocopying by libraries, it had not

(Continued on following page)

technology itself was beyond legal reproach, a straightforward market solution proved successful: On behalf of publishers, the Copyright Clearance Center offers licenses to commercial users of photocopiers.[57] Private ordering prevailed again in the mid-1990's, as the motion picture industry worked cooperatively with consumer electronics companies to develop anti-piracy safeguards for the Digital Versatile Disc ("DVD"). The result was an effective encryption technology, the Content Scrambling System ("CSS"), which protects DVD's against unauthorized, widespread reproduction.[58]

In rare instances, Congress and regulatory agencies have engaged in limited technology regulation to resolve conflicts between copyright stakeholders. But these rules are rare and narrowly focused. In the mid-1980's, having lost its prior legislative attempts to impose restrictions on dual cassette recorders, the music industry expressed concerns over new equipment that enabled consumers to make multiple generations of high-quality digital copies of copyrighted music. Negotiations with the consumer electronics industry eventually produced the compromise embodied in the Audio Home Recording Act of 1992

addressed the issue more generally in the 1976 Copyright Act. *See* National Commission on New Technology Uses of Copyrighted Works, *Final Report* 89-104 (1979).

[57] Copyright Clearance Center, Inc., *Corporate Overview: Creating Copyright Solutions, at* http://www.copyright.com/About/default.asp (last visited Nov. 5, 2004). *See generally Am. Geophysical Union v. Texaco, Inc.,* 60 F.3d 913 (2d Cir. 1995).

[58] *See* Eddan Elizafon Katz, *RealNetworks, Inc. v. Streambox, Inc. & Universal City Studios, Inc. v. Reimerdes,* 16 Berkeley Tech. L.J. 53, 60 (2001). For details of CSS, see Frank A. Stevenson, *Cryptanalysis of Content Scrambling System,* Openlaw Open DVD/DeCSS Forum, Nov. 8, 1999, *available at* http://cyber.law.harvard.edu/openlaw/DVD/resources/crypto.gq.nu.html.

("AHRA").[59] The AHRA upholds the principle of *Sony* by protecting consumers' rights to make general non-commercial use of digital recorders, while compensating copyright holders[60] and mandating the Serial Copy Management System ("SCMS") to allow the creation of first-generation copies only.[61] An unusual departure from the more typical hands-off approach, the AHRA stands as an example of Congress anticipating the copyright problems created by a new technology and acting preemptively to protect consumers, manufacturers and copyright holders through a targeted intervention.

Similarly, the Federal Communications Commission ("FCC") has sought to impose limited regulation on a promising new technology – digital television – that holds out enormous benefits to consumers,[62] but has been resisted by content owners concerned that high-quality digital content might be captured and redistributed in violation of copyright.[63] In response, after an extensive notice-and-comment proceeding, the Commission adopted its "Broadcast Flag" rule to "provide content owners with reasonable assurance that DTV broadcast content will not

[59] 17 U.S.C. §§ 1001-10. *See generally* Andrew Sparkler, *Senators, Congressmen, Please Heed the Call: Ensuring the Advancement of Digital Technology Through the Twenty-First Century*, 14 Fordham Intell. Prop. Media & Ent. L.J. 1137 (2004).

[60] *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1407-08 (2004).

[61] *See* June M. Besek, *Anti-Circumvention Laws and Copyright: A Report From the Kernochan Center for Law, Media and the Arts*, 27 Colum.-VLA J.L. & Arts 385, 436 (2004).

[62] *See* Robert X. Cringely, *Welcome to Digital TV: A Cringely Crash Course, at* http://www.pbs.org/opb/crashcourse (last visited Nov. 5, 2004).

[63] *See* Center for Democracy & Technology, *Implications of the Broadcast Flag: A Public Interest Primer (version 2.0)*, at 7, Dec. 2003, *available at* http://www.cdt.org/copyright/broadcastflag.pdf.

be redistributed while protecting consumers' use and enjoyment of broadcast video programming."[64] The rule contemplates an embedded code that receiving equipment would be required to recognize, indicating that the marked content must be protected from general redistribution; the coding would not interfere with consumers' ability to make personal use copies.[65] While controversial,[66] the FCC rule nevertheless illustrates how cautious regulators approached a copyright issue with the stated goal of preserving the public benefits of technological innovation.

Finally, it is noteworthy that in the aftermath of *Grokster*, Congress and the private sector continue to study so-called "Induce" legislation, which now would be directed against – and only against – the abuse of P2P technology.[67] Whether or not it is desirable in this instance, such a targeted regulatory intervention lies outside the special competencies of the federal courts.

CONCLUSION

This Court should resist being drawn into any general reconsideration of the *Sony* standard – especially on the

[64] FCC, *Report and Order and Further Notice of Proposed Rulemaking, In the Matter of: Digital Broadcast Content Protection*, 68 Fed. Reg. 67,599 (2003).

[65] *See* Motion Picture Association, *Broadcast Flag: Frequently Asked Questions, at* http://www.mpaa.org/Press/Broadcast_Flag_QA.htm (last visited Nov. 5, 2004).

[66] *See Am. Library Ass'n, et al. v. FCC*, No. 04-1037 (D.C. Cir., filed Jan. 30, 2004) (appeal of the Order by a coalition of public interest groups and libraries, arguing that in mandating the "broadcast flag" the FCC exceeded its statutory authority and impermissibly limited rights granted consumers under copyright law).

[67] *See* Chloe Albanesius, *Entertainment, Tech Industries Spar Over Copyright Bill*, National Journal's Tech. Daily, Oct. 20, 2004, *available at* 2004 WL 74916798.

basis of a technology as controversial and uncertain in scope and application as P2P. Any revision of *Sony* to meet this transitory challenge would be fraught with unintended consequences for the American economy and for American information culture. A century ago, Justice Holmes declared that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . ."[68] Similar caution is appropriate for judicial intervention in the marketplace for innovations that are capable of both infringing and substantial noninfringing uses.

Respectfully submitted,

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[68] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).